SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-309

ANTHONY LAGATTUTA and CARL LUICK,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Anthony Lagattuta and Carl Luick, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on June 20, 1973. A timely petition for rehearing was filed and it was denied by Order dated July 24, 1973.

Opinions Below

The United States Court of Appeals for the Third Circuit entered a judgment order dated June 20, 1973. It is reprinted in the Appendix at Page A-1, *infra*. The United States District Court for the Western District of Pennsylvania filed an opinion and it is reprinted in the Appendix at Pages 3a-10a.

Jurisdiction

Following a jury trial, the petitioners were found guilty in Count One of Conspiracy in Violation of Title 18, U. S. Code, Sec. 371, and petitioner Lagattuta was found guilty in Counts Two through Twelve of substantive violations of Sec. 1341, Title 18, U. S. Code. Petitioner Carl Luick was found guilty of substantive violations of Counts Five through Twelve of the Indictment charging violations of Sec. 1341, Title 18, U. S. Code.

On November 28, 1972, petitioner Anthony Lagattuta was sentenced on Counts One and Two to the custody of the Attorney General for a period of five years to run concurrently and on Counts Three through Twelve sentence was suspended and he was placed on probation for a period of five years on each Count to run concurrently.

On November 28, 1972, defendant Carl Luick was sentenced to the custody of the Attorney General on Counts One and Two for a period of two years and to be placed in a jail type institution for a period of ninety days and the remainder of the sentence was suspended and he was placed on probation for the remainder of that sentence. He was also sentenced to pay a fine of $5000.00. The sentence on Counts One and Five on imprisonment were to run concurrently. On Counts Six through Twelve the sentence was suspended and he was placed on probation for a period of five years to run concurrently.

On June 20, 1973, the Court of Appeals for the Third Circuit affirmed petitioners' judgment of conviction. A petition for a rehearing was timely filed and that petition was denied by Order dated July 24, 1973.

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Sec. 1254 (1).

Questions Presented

1. In a mail fraud indictment, where the Government charges that the substance of the scheme was to intentionally destroy a building by fire and then to collect the proceeds of the fire insurance policy, is not the Government required to prove that the building was in fact intentionally destroyed by fire.

2. In an indictment charging conspiracy to violate the Mail Fraud Statute, must not the Government prove that defendants at least intended to use the mails to carry out their scheme.

3. Whether a person may be found guilty when the Court of Appeals finds the evidence is slight.

4. Whether it is prejudicial error for the Government's Attorneys, who know that a witness will take the Fifth Amendment and refuse to testify, to call that witness to the stand and in front of the jury offer him immunity and have the Court order him to testify in front of the jury.

5. Whether in a Criminal trial defendants are denied the right to a trial by jury by the Court's refusal to set forth their theory of the case and their defense in a clear charge to the jury.

6. Whether the petitioners after the trial having acquired new evidence indicating that a key witness against them was made substantial promises by the Government in exchange for the testimony, were they not entitled to have the Court at least require the Government to answer their allegations and determine whether there is any substance to their allegations and not have their application summarily denied.

Statute Involved

18 U. S. C. Section 371.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U. S. C. Section 1341.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be intimidated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowningly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Statement of Facts

This case arose as a result of an Indictment filed in the United States District Court for the Western District of Pennsylvania. Basically, what the Government charged in the Indictment was a conspiracy to use the mails to defraud an insurance company by burning down a building. In Count One they charged the conspiracy and in Counts Two through Twelve they charged that the scheme was to intentionally burn down the building to defraud the insurance company and for the purpose of executing this scheme they caused various letters to be mailed. The Government charged that the defendants Jones, Petrone and Lagattuta caused the building to be destroyed by fire or procured it, and that Luick, Jones, Lagattuta and Petrone all knew that the building was intentionally destroyed by fire by them and that the insurance company was not liable. Mr. Petrone died prior to the trial and this petition for certiorari is being requested by petitioners Luick and Lagattuta.

In very simple terms, the Government has charged that the petitioners caused the property to be destroyed by fire in order to collect the fire insurance policy and mailing various items in furtherance of the scheme.

At the trial the petitioners requested the Court to enter a judgment of acquittal because there was no proof that there was an intentional destruction of this building by fire. To the contrary, we argued that there was only evidence that the building was destroyed by fire. The investigator for the insurance company testified that he did check with the Bomb and Arson Squad and that the Bomb and Arson Squad found no evidence that the building was intentionally destroyed by fire. The trial court indicated that the whole

indictment wraps up this case as a "torch case" in effect and that the defendants were to collect the money.

We argued to the Court that the Government did have to prove what was tantamount to Arson to defraud an insurance company and without proof of an Arson type fire, there could not be a finding of guilt in this case.

The trial court rejected this argument and would not give a charge in support of this contention and did not submit defendants' theory to the jury by a charge that would have outlined their theory of defense.

In defendants' motion for a new trial they raised various substantial issues, but the trial court refused to give them oral argument on their motion and when an appeal was taken to the Court of Appeals, again the appellants were denied an oral argument and the Court of Appeals did not file an opinion, but merely entered a judgment order.

REASONS FOR GRANTING THE WRIT

I

The substance of a scheme must be proven before anyone could be convicted for violation of the Mail Fraud Statute.

The system of justice will function most efficiently in the United States if the Courts will follow their own decisions. We submit that the law applicable in a mail fraud prosecution has been thoroughly analyzed by the United States Court of Appeals many years ago in the case of *United States v. Kram*, 247 F. 2d 830 (3d Cir. 1957). However, the current Court of Appeals failed to follow its own decision and refused to apply the law as enunciated in the *Kram* case.

In the instant case the Government has elected to set up in the Indictment as the substance of the offense that the petitioners with the intent to collect money provided for in the insurance policy procured the destruction of the building and also pretended that the fire which destroyed the building was of unknown origin, when the Government charges that the petitioners knew that the fire was neither accidental nor unknown but one which was originated by the acts, design and procurement on the part of certain of the defendants.

The United States Court of Appeals for the Third Circuit previously held in the case of the *United States v. Kram*, 247 F. 2d 830, 833,

> "But in this case the United States has elected to set up in the indictment as the substance of the offense that the printed material, with which the religious object was enclosed, was drawn up in such a manner as to mislead the persons who received it from Kram into thinking it was a solicitation from a religious organization. If the United States has failed to prove this allegation it has failed to prove, in the words of the indictment, 'the substance of * * * (the) scheme', and, hence to prove Kram guilty as charged in the indictment. This is true whether or not Kram in fact devised and executed a fraudulent scheme to mulct the public by the use of the mails. In other words the United States has cast its whole case on the proof of an intentionally misleading solicitation. It need not have done so but it so chose and must stand or fall on its choice. To try Kram upon some other theory of guilt in view of the charge of the indictment would be to deny him due process of law."

We submit that the Government did not prove the scheme that they alleged because they did not prove that this building was, in fact, intentionally destroyed by fire. On cross examination it was developed that the cause of the fire

had been investigated by the Bomb and Arson Squad of the City of Pittsburgh and the insurance company investigator filed his report stating that the Bomb and Arson Squad found no evidence of Arson and, in fact, the insurance company investigator told the Grand Jury that the Bomb and Arson Squad had told him that they had no reason for suspicion concerning the fire.

The intentional burning of a building with the intent to defraud an insurer or the intentional burning of a building are two types of arson and whether the word "arson" is used or whether the words "intentional burning of a building" is used the effect is the same. What is needed to prove arson and what is needed to prove the intentional burning of a building is the same. See *Vol. 6 Corpus Juris Secundum, Arson, Sec. 1 and Sec. 2.* While perhaps it is true we are not trying an arson case in the Federal Courts, we are trying a case in which the scheme alleged was an intentional destruction of a building with the intent to defraud an insurance company. The question then is was there proof of an intentional destruction of a building.

A leading case in Pennsylvania should be looked at as persuasive authority as to what is needed to prove intentional destruction of a building. This case is the case of *Commonwealth v. Leslie*, 424 Pa. 331, 227 A. 2d 900 (1967). In that case the Court set forth what is necessary to prove the intentional destruction of a building, that is:

(1) There must be a fire

(2) It must be of incendiary origin, and

(3) The defendant must be the guilty party.

We recognize in this case that there was, of course, a fire. However, we submit there is absolutely no proof that this fire was of incendiary origin. The decision in *Commonwealth v. Leslie supra,* pointed out the necessity of the proof of an incendiary origin of a fire. In that case there was a fire and a confession that the defendant caused the fire. Yet the Court would not sustain a conviction because there was not proof of incendiary origin without the confession.

We submit that in the *Leslie* case as in the case of *Commonwealth v. Winter,* 174 Pa. Super. 35, 98 A. 2d 221 (1953) the Jury here must be able to find that there was an intentional fire. An intentional fire means an incendiary origin.

We ask where is the proof of incendiary origin. There was evidence of motive and there was even evidence of plan, and there was evidence of a fire, but that is not proof that the fire was, in fact, set by the defendants or even set by anyone. In Vol. 6 *Corpus Juris Secundum Arson,* Sec. 29, page 749, the authorities point out that,

> "The evidence must also disclose that it was burned by the wilful act of some person criminally responsible for his acts and not by natural or accidental causes."

The authorities there continue and point out,

> "In a prosecution for statutory crime of burning insured property with the intent to defraud the insurer, the State must establish that the fire was incendiary in origin and that the accused was criminally responsible for it as well as that the insured intended to defraud the insurer thereof." See also *Commonwealth v. Pogach,* 180 Atl. 126 (1935) (Pa. Superior Ct.).

If we look at the evidence in this case, all we have is that a few people said they heard some sounds at or about the

time of the fire and that some of them said they saw the fire break out. Other persons said they saw an automobile or persons in the area, but no one gave any testimony as to what was the cause of this fire.

Several fire companies were on the scene. Many firemen fought the fire. Not one fireman was called to the stand to be questioned as to what he found at the fire. No expert testimony was given as to what was the cause of the fire. We have only the bare isolated testimony of one woman who said she smelled gasoline, but we do not know where that gasoline came from or whether it had anything to do with the fire. We submit on that bare testimony alone, it is insufficient to find an incendiary origin when we see that no fireman testified to this and this woman did not even tell the Bomb and Arson Squad investigator anything about it.

II

The Court of Appeals for the Third Circuit misconstrued the necessity of proof of intent to use the mails to defraud in a conspiracy count and has made a decision contrary to the decision in the Fifth Circuit.

It was submitted to the trial court in an argument for judgment of acquittal and in the Points for Charge that as to the conspiracy count there had to be a specific proof of intent to use the mails to defraud besides proving the scheme.

It would not be sufficient that the mails were only used incidentally or happened to be used by somebody else. We called to the Court's attention the case of *Mazurosky v. U. S.*, 100 F. 2d 958, 962. This case arose in the Fifth Circuit. The Court of Appeals in that Circuit pointed out that,

> "The Courts have drawn a distinction in the proof of intent necessary in a conspiracy charge and a charge of the substantive offense of using the mails to defraud. Farmer v. United States, *Supra*, 223 F. Page 907. Where the charge is conspiracy to use the mails to defraud, in addition to proving a scheme to defraud, it is necessary to show an intent to use the mails to effect the scheme." *Mazurosky v. United States, Supra*, at 962.

The Court held in the *Mazurosky* case that since there was no evidence that it was part of the scheme of those engaged in the fraudulent scheme to use the mails, an essential element was lacking and a judgment of conviction was reversed.

The Court of Appeals also in the case of *Weiss v. United States*, 122 F. 2d 675, 680 (5th Cir. 1941) held,

> "Where a conspiracy to commit the offense is charged, there is a third element, not involved in the commission of the substantive offense, an intent to use the mails in execution or attempted execution of the fraudulent scheme."

More recently the Court of Appeals in the Fifth Circuit discussed this distinction in the case of *Abbott v. U. S.*, 239 F. 2d 310, 314 (5th Cir. 1956). The Court in that case pointed out that there is a distinction between a conspiracy count, which requires actual proof of intent to use the mails, as distinguished from the substantive count where it is sufficient that it could be expected that the mails would be used. The Court in the *Abbott* case also referred to case of *Guardaldini v. U. S.*, 128 F. 2d 984, 985 (5th Cir. 1942). The Court pointed out there that in a conspiracy charge intent to use the mail is a necessary element and proof of this must be given, whereas in a substantive count such specific proof of intent is not needed.

The Court below we submit would not recognize this important element of proof and the Court of Appeals for the Third Circuit by their judgment order obviously rejected this argument and made a decision contrary to the decision in the Fifth Circuit, because in paragraph 2 of the Judgment Order the Court misconstrued the argument and never passed on the contention whether there has to be proof of an intent to use the mails to carry out a scheme to defraud as distinguished from a mere incidental use of the mails in a substantive count. In fact, the Court of Appeals in that sub-paragraph indicated that the Court merely submitted a general charge as to whether there was a conspiracy and not whether there was a conspiracy to use the mails to defraud and the importance of intent to use the mails.

We submit that the Court of Appeals for the Third Circuit has made a decision contrary to the decision of the Court of Appeals in the Fifth Circuit and that is another reason why this Court should grant Certiorari.

III

Whether a person may be found guilty when the Court of Appeals says the evidence is slight.

As to petitioner Carl Luick, he was a public fire adjuster. The Government did not charge that he had anything to do with the causing of the fire in question. They merely charged that he submitted a false invoice and wanted the jury to infer that he knew what was the cause of the fire. At page 551 of the trial transcript, the District Court asked the Government this question:

> "Is there any proof at all that Mr. Luick knew this was a set fire?"

The Government did not prove that this was a set fire, let alone that Mr. Luick knew that it was a set fire. Since the Government failed to prove an essential element of the crime, Mr. Luick's knowledge, he should be entitled to a judgment of acquittal. See *Politano vs. U. S.*, 220 F. 2d 217 (10th Cir. 1955).

The Trial Court in an opinion stated that there was no direct evidence that Mr. Luick knew the club was "torched". There was no evidence that Mr. Luick had anything to do with this club until after the loss in May of 1970 and then his only function was to adjust the loss with the adjuster for the insurance company.

The Trial Court in its opinion stated that there was no direct evidence that Mr. Luick knew the club was "torched". However, the Court below thought that a casual remark by Mr. Luick allegedly made to a witness was circumstantial evidence of guilt and was sufficient to find him guilty of knowing that the fire was set.

The Court below placed great significance on a casual remark a witness said Mr. Luick made, a casual remark one time when he was speaking to Mr. Waldo, either in May or October, using the phrase "Jewish Lightning". The Witness Waldo said that it didn't mean anything to him and thought it merely a jovial expression that he had grown up with over the past fifteen years. He expressly stated that it didn't mean anything to him. Transcript, pp. 205 and 206.

The Court below at the time of argument on motion for a judgment of acquittal at the conclusion of the Government's case at page 551 of the Transcript, asked,

> "Was there any evidence to show that Mr. Luick knew anything about the fire being intentionally set?"

At Transcript 551, the Government's only reply was the isolated remark using the word "Jewish Lightning".

The Court of Appeals for the Third Circuit has compounded this error and established, we submit, a very dangerous principle by holding that the evidence, while slight, was sufficient. See paragraph 4 of the Judgment Order of the Court of Appeals entered in this case. The Court of Appeals has established a principle that slight evidence is sufficient to find someone guilty in a criminal case and has effectively abolished the necessity of finding someone guilty beyond a reasonable doubt. Such a dangerous precedent must not be permitted to exist in the United States for if it does, our cherished freedoms will be jeopardized and we will change from a Government of Law and Justice to a Police State where slight inferences are sufficient to find someone guilty of serious criminal charges.

IV

The Government in a criminal case commits prejudicial error when they know the only witness to the alleged scheme will claim the privilege against self incrimination and they place such witness on the witness stand knowing that he will claim the privilege of self incrimination and immediately presenting an order for immunity in open court and the court granting immunity and ordering him to testify in the presence of the jury.

The only witness in this case as to the alleged scheme and the only witness against Lagattuta was Frank Teny. Frank Teny was the first witness called by the Government at the time the Government called him they knew he was going to refuse to testify and claim his privilege under the Fifth Amendment. He answered his name and address

but when asked his occupation and if he knew Anthony Lagattuta he refused to answer on the grounds that it might incriminate him (T. 31). Immediately thereafter the Government produced a Motion to grant Mr. Teny immunity and presented it in open Court. We moved at that time for a withdrawal of a juror because we felt it was prejudicial to the defendants due to the fact that the Government put a witness on the stand knowing that he was going to take the Fifth Amendment and then went through what we contend was a dramatic exhibition of asking the Court to grant him immunity in the presence of the Jury. He was granted immunity in the presence of the Jury and he was ordered to testify. The Court ordered in open Court in the presence of the Jury that he must testify and that he would be immune from prosecution from anything he said except for contempt or perjury.

With this setting in the case the Jury obviously had to get the impression that since the man was ordered to testify and that he would be prosecuted for contempt if he did not testify or perjury if he testified falsely that what he said had to be the truth. This was unnecessary dramatics on the part of the Government and prejudiced the defendants.

The Court made an explanation to the Jury of what it was doing and while the explanation was technically accurate we think its effect was to do more harm than good because here again the Jury was being told that the witness had to testify. We submit the Jury did not have to see this and the dramatic presentation that the Government carried out.

We did ask for a withdrawal of a Juror at that point and since it was the first witness called by the Government very

little would have been lost by granting our Motion and defendants' rights would have been easily protected. Nevertheless, our Motion was overruled.

This prejudicial error instead of being condemned by the Court of Appeals appears to have been approved by the Court of Appeals. We submit that the rational of the case of *Giglio v. U. S.*, 405 U. S. 150, does permit the Government to engage in such dramatics.

V

This Honorable Court must clearly establish that it is prejudicial error to fail to charge a jury on a defendant's theory of defense to an indictment if there is evidence to support it and a proper request for such an instruction is made.

The petitioners did submit various points for charge and their basis intention was that the Government had to prove that this fire was an intentional fire and that it had to have an incendiary origin. Specific points setting forth this theory were submitted in the Points for Charge as well as points relative to the importance of finding an intent to use the mail in the conspiracy count as distinguished from the substantive counts.

The authorities are clear that "a party is entitled to a specific instruction on his theory of the case if there is evidence to support it and a proper request for an instruction is made." *Vol. 2, Wright Fed. Practice & Procedure*, Sec. 482, page 279. The authorities are set forth in footnote 20 to Prof. Wright's Treatise and he cites authorities from many Circuit Courts of Appeal in this country which have discussed the subject. Circuit Judge J. Skelly Wright in an Opinion in the case of *Salley v. United States*, 353 F. 2d 897, 898 (C. A. 1965) held,

"Since Levine v. United States, 104 U. S. App. D. C. 281, 282, 261 F. 2d 747, 748 (1958), it is clear that, despite the trial judge's correct charge that each element must be proved beyond a reasonable doubt, 'it is reversible error for the court to refuse on request to instruct also as to defendant's theory of the case. This rule * * * applies as well to situations where special facts present an evidentiary theory which if believed defeats the factual theory of the prosecution * * *.' See also Tatum v. United States, 88 U. S. App. D. C. 386, 391, 190 F. 2d 612, 617 (1951).

The importance that the defendants are entitled to have instructions presented is also discussed by the United States Court of Appeals for the Fifth Circuit in the case of *Strauss v. United States*, 376 F. 2d 416, 419 (5th Cir. 1967) where the Court held:

"'It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation of the evidence.' Perez v. United States, 5 Cir. 1961, 297 F. 2d 12, 13-14. (emphasis added). We find no requirement that a requested charge encompass, in the trial judge's eyes, a believable or sensible defense. The judge is the law-giver. He decides whether the facts constituting the defense framed by the proposed charge, if believed by the jury, are legally sufficient to render the accused innocent. The jury is the fact-finder. If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible. Bryan v. United States, 5 Cir. 1967, 373 F. 2d 403. The judge must, therefore be cautious and unparsimonious in presenting to the jury all of the possible defenses which the jury may choose to believe. We hold that where the defendant's proposed charge presents, when properly framed, a valid defense, and where there has been

some evidence relevant to that defense adduced at trial, then the trial judge may not refuse to charge on that defense. In Tatum v. United States, 1950, 88 U. S. App. D. C. 386, 190 F. 2d 612, 617, the D. C. Circuit said:

> "We do not intend to characterize the case for the defense as either strong or weak. That is unnecessary for "in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own."'"

This rule has also been followed by the United States Court of Appeals for the Seventh Circuit in the case of the *United States v. Grimes*, 413 F. 2d 1376, 1378 (7th Cir. 1969) where the Court of Appeals for that Circuit pointed out:

> "We start with the proposition that the defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by law and which has some foundation in the evidence, however tenuous. Tatum v. United States, 88 U. S. App. D. C. 386, 190 F. 2d 612, 617 (D. C. Cir. 1951); United States v. Phillips, 217 F. 2d 435, 443-443 (7th Cir. 1954)."

Our theory of defense was clearly set forth not only in our written Points for Charge but in our trial brief that we filed prior to trial and in our argument to the Court on our Motion for Judgment of Acquittal. In addition, when we took exceptions to the Court's Charge, we again tried to get the Court to charge on our theory of the defense to the accusations made against the defendants. (Tr. p. 639). The Court said it would give in substance request No. 12, but it did not do so.

Throughout our requested Points for Charge, we tried to get a clear and definite charge to the Jury, that the Court should tell the Jury what was necessary to find an intentional set fire that was either set by these defendants or caused to be set by these defendants. The Court instead of granting the defendants a fair charge on this issue, that all the Court told the jury in this regard as to our theory was set forth on page 625 of the Transcript when the Court merely stated:

> "Defendants contended there is absolutely no proof that they knew of the origin of the fire.
>
> Now, if you find that any of them did not procure the fire or know that it had been procured by someone else or of its origin as alleged in the Indictment, then the Government would have failed to prove the allegations as to that individual and that defendant should be found not guilty."

This, we submit, certainly did not in any way present defendants' theory of the case. That not only was defendants' theory of defense not submitted to the Jury, but the Jury was practically told that there wasn't anything to our theory of defense as the Court told the Jury in its charge (Tr. 626) that,

> "This is not a case in which Arson is the charge. We are not trying an Arson case. Arson cases are tried up the street in State Court. We are charging that the crime of an intentional burning which involved the use of the mails."

In addition the Court failed to adequately charge the Jury concerning the conspiracy. The conspiracy was a conspiracy to use the mails. There had to be proof that the defendant *intended to use the mails* in the conspiracy count and we submit that the importance of proof of this element was not set forth clearly to the Jury.

We specifically asked the Court for an instruction in this regard in point Eight of our requested Points for Instruction as follows:

> "In Count One of the Indictment, the defendants are charged with conspiracy to use the mails to defraud; in addition to proving the scheme to defraud, it is necessary for the Goverment to show an intent to use the mail to effect the scheme." *See also U. S. v. Mazurosky*, 100 F2d 958, 962.

This requested point for charge was refused by the Court at page 585 of the Transcript where the Court stated:

> "Eight is denied."

At the conclusion of the Court's charge, specific exception was taken to the Court's failure to charge the necessity of proof of intent to use the mails in order to sustain a finding of guilt under conspiracy charges. We submit the Court did not really cover this in its charge and did not make the point clear to the jury. The Court's charge was approximately 40 to 44 pages in length, but we submit it did not cover the defendants' theory of the case, it did not adequately tell the jury the importance of finding an intent to use the mails as the real basis of the conspiracy charge, but rather it dealt on the responsibilities of each person for an act of a conspirator if it found a conspiracy. It failed to get to the real issue involved, that of an intentional fire set or caused by these defendants to defraud an insurance company. It failed to adequately charge the jury about an incendiary origin as distinguished from an accidental fire and the importance of proof of finding an incendiary origin. We tried to bring this out in our points for charge, but they were rejected by the Court.

The Court of Appeals, again we submit, instead of answering the contention of the petitioners herein merely stated that the charge was sufficient and did not pass on the importance of charging as to the theory of defense. The Court of Appeals for the Third Circuit has created a situation in which they have, we submit, rejected the principles of a fair trial and a proper charge to a jury as enunciated in the Court of Appeals for the District of Columbia in the case of *Salley v. United States,* 353 F. 2d 897 (1965); in the Court of Appeals for the Fifth Circuit in the case of *Strauss v. United States,* 376 F. 2d 416 (1967); and in the Court of Appeals for the Seventh Circuit in the case of *United States v. Grimes,* 413 F. 2d 1376 (1969). Thus three Courts of Appeal have clearly set forth that the defendants are entitled to have their theory of defense submitted to the jury under proper instructions. The Court of Appeals for the Third Circuit has rejected this rule.

VI

Whether petitioners' convictions must be reversed because the Court committed reversible error in summarily rejecting their motions for new trial on after discovered evidence without requiring the Government to answer the allegations in their motion and without securing any affidavits or without holding a meeting.

The key witness in this case was Frank Teny. Without his testimony, there would be no case against any defendant based on the Indictment filed. His reliability was determinative of the guilt or innocence of the defendants. The defendants were certainly entitled to have a full disclosure of all evidence known by the Government that would affect his credibility. Shortly after the Court overruled petitioner's motion for a new trial, and a date was set for

sentence, a story appeared in the Pittsburgh Press, the leading newspaper in the City of Pittsburgh, which was published on November 22, 1972, which stated that the Strike Force lawyer in charge of the case came to know Teny well during the preparation of the trial, and the story went on to state that following his day in Court, the Strike Force had arranged to change his identity by acquiring for him a new Social Security number, a home in California, and a job.

At the time of the trial we did not know of these things and this information, we submit, was not furnished to the defendants although we tried to inquire whether there were any promises made to this witness by the Government, which he denied.

This Court in the case of *Giglio v. United States,* 405 U. S. 150, required that there be full disclosure to the defense of any factors known by the Government and any agreements made with the witness. In the *Giglio* case, this Court pointed out that the Government's case there depended almost entirely on the witness's testimony and without it there could have been no indictment and no evidence to carry the case to the jury. The credibility of the witness was therefore an important issue in the case and the jury was entitled to know all of the circumstances.

Similarly, we submit that here the Government's case rested entirely on Teny's testimony. Without it, there could have been no indictment and no evidence to carry the case to the jury. Teny's credibility as a witness was therefore an important issue in the case and the evidence of any understanding or agreement by the Government as to changing the witness's identity, getting him a job, and acquiring a home for him would be relevant to his credibility and the jury was entitled to know of this. We

specifically asked the witness this question: "Do you expect you are going to get any help from the Government for the testimony you have given today?" The Government objected to this question, which objection was overruled. The witness answered: "I tried to ask them for help and they said their hands are tied with that help." Transcript pages 129 and 130. The net effect of his testimony was that he said the Government wasn't going to do anything for him. Nevertheless, it appears that the Government did make various promises to him and did do things for him. The very least that the Court below could have done would have been to direct that the Government answer our petition.

In the case of *Richardson v. United States,* 360 F. 2d 366 (Fifth Circuit 1966), the Court of Appeals for the Fifth Circuit held that the failure to conduct a thorough inquiry to determine what occurred before overruling Defendant's Motion for a New Trial was an abuse of discretion. The Court there stated that inasmuch as the alleged impropriety was not denied and since no hearing was conducted, the Appellate Court said that an improper conversation was being confessed by the failure to deny or hold a hearing. Prejudice was assumed in the form of a rebuttable presumption. The Court there vacated the order denying a motion for a new trial and remanded the case to the District Court with directions to hold a hearing.

In the case of *Gordon v. The United States,* the Court of Appeals for the Sixth Circuit, at 178 F. 2d 896 (1949), held that a decision on a Motion for a New Trial should be based only on evidence by affidavit, deposition or on sworn testimony in open Court. In the instant case, none of these occurred. We had a situation very similar to the situation before the Supreme Court of the United States in the case of *Giglio.*

The District Court and the Court of Appeals for the Third Circuit refused to do anything about petitioners' motion despite the fact that the witness involved here was the key witness against them and without his testimony there could not be a conviction. To summarily reject the application for a new trial on after discovered evidence creates a situation in which the rules in the Third Circuit are contrary to the decision of the Supreme Court of the United States and contrary to decisions in the Fifth and Sixth Circuits.

Conclusion

For all of these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6) June 12, 1973.

Before: GIBBONS, ROSENN and WEIS, *Circuit Judges.*

Judgment Order

Appellants were convicted of mail fraud and conspiracy to violate the mail fraud statute. 18 U. S. C. §§ 1341, 371. The case involved the obtaining of proceeds of a fire insurance policy as a result of arson of an insured building. The appellants contend:

(1) That the Government failed to prove that appellants intentionally destroyed the building. There was sufficient evidence to submit the question to the jury.

(2) That the Government's evidence failed to establish a conspiracy to use the mails to defraud. There was evidence that appellant Luick mailed to an insurance adjuster a false proof of loss. *See United States v. Marine,* 413 F. 2d 214, 219 (7th Cir. 1969), *cert. denied,* 396 U. S. 1001 (1970). On all the evidence in the Government's case there was a jury question, and the court correctly charged that in determining whether there was a conspiracy the jury would have to find "(t)hat the conspirators would place and cause to be placed in the post office and authorized depositories for for mail matters . . ."

(3) That on the substantive count the Government did not prove mailing. There was evidence that Luick mailed a falsified proof of loss, and there was evidence from which the jury could find a reasonable expectation that the mails would be so used.

See Pereira v. United States, 347 U. S. 1, 8 (1954); *Bannister v. United States*, 379 F. 2d 750, 753 (5th Cir. 1967).

(4) That the Government did not connect Luick to the conspiracy. The evidence, while slight, was sufficient. *United States v. Kenny*, 462 F. 2d 1205, 1226 (3d Cir.), *cert. denied*, 409 U. S. 914 (1972).

(5) That prejudicial error occurred when a co-defendant was called to the stand and granted immunity in front of the jury. The witness in question did testify, and the fact that he had been granted immunity was, if anything, helpful to the defense on his credibility. *See Giglio v. United States*, 405 U. S. 150 (1972).

(6) That authorization for the grant of immunity to a witness was not properly authenticated. The appellants lack standing to assert a violation of the witness' privilege against self-incrimination.

(7) That the court took judicial notice that the GAA Club, whose building was burned, was privately owned. The ownership is not in dispute and the court properly took steps to prevent the trial from becoming enmeshed in detail.

(8) That the Government's summation was prejudicial. It was not. The factual arguments advanced were permissible inferences from the evidence.

(9) That the court did not charge the jury on the appellants' theory of the defense. The charge is sufficient.

(10) That the appellants' motion for a new trial based on newly discovered evidence should have been granted. The evidence related to an issue bearing on the credibility of one witness who had been granted immunity. His credibility was explored in the trial, and his evidence was cumulative. There was no error in denying the motion.

It is therefore ORDERED and ADJUDGED that the judgment of the district court is affirmed.

BY THE COURT,
/s/ JOHN J. GIBBONS,
Circuit Judge.

Attest

/s/ THOMAS F. QUINN,
Clerk.

Dated: June 20, 1973.

Opinion

(Filed November 16, 1972.)

HUBERT I. TEITELBAUM, *District Judge.*

Two of the three defendants in this criminal case,[1] Anthony Lagattuta and Isaac Roddie Jones, were convicted on all twelve counts of the twelve count indictment. Carl Luick, the other defendant, was convicted on only nine of the twelve counts, the second, third and fourth counts against him having been dismissed by the court.[2]

The first count charged a conspiracy to commit mail fraud, in violation of 18 U. S. C. § 371; the remaining eleven

[1] John Petrone was also named in the indictment as a defendant, but he died before the case was tried.

[2] The court reserved decision on the nine remaining counts as to Luick under the authority of F. R. Cr. P. 29 (b).

counts charged actual mail fraud, in violation of 18 U. S. C. § 1341.[3] Specifically, the indictment alleged (1) that Jones obtained an insurance policy on the German American Association of Allegheny County ("the club") and its contents in the amount of $160,000.00, (2) that Petrone, Jones and Lagattuta procured the destruction of the club with the intent to collect the proceeds of the insurance policy, (3) that all the defendants obtained the proceeds by falsely representing that the fire which destroyed the club was of unknown origin, when they knew that it was neither accidental nor of unknown origin, but was set by their own acts, designs and procurements, (4) that they submitted false and fraudulent claims, including back-dated invoices for fictional merchandise and services, to the insurance company, and (5) that after they received the proceeds, they divided them among themselves. In the conspiracy count of the indictment, it was alleged that the defendants operated under an agreement which they had among themselves to perpetrate the fraud.

The defendants have filed motions (1) for a new trial, (2) for arrest of judgment and (3) for judgment of acquittal. In support of the motions, they have offered over twenty reasons. Many are frivolous and do not merit comment. Those few which do will be reviewed *seriatim*.

First, relying on *United States v. Kram*, 247 F. 2d 830 (3rd Cir. 1957), the defendants argue that the Government failed to prove what it alleged in the indictment. In *Kram*, which similarly involved a charge of mail fraud, it was

[3] Each use of the mails related to the mail fraud is a separate offense, notwithstanding the singleness of the scheme. *Badders v. United States*, 240 U. S. 391 (1916).

held that the Government must prove what it alleges, notwithstanding the superfluity of its allegations to the elements of the offense. There, the Government needlessly charged in the indictment that a certain document that was sent through the mails was "so drawn as to be intentionally misleading". The rationale of the court in *Kram* was that since the Government had "cast its whole case on the proof of an intentionally misleading solicitation", its failure to prove the misleading character of the solicitation was fatal.

Here, the Government gratuitously and needlessly charged that the defendants conspired to procure and procured the intentional burning of the club. The defendants contend that this was not proved by sufficient evidence.[4] They contend, specifically, that there was no proof that the fire which destroyed the club was set intentionally, or that even if there was proof that the fire was set intentionally, that there was no proof that it was procured by the defendants.

The testimony was extensive. Frank Teny, one of the original owners of the club, testified that when the club hit upon hard financial times, Petrone suggested that the club be burned down for the purpose of obtaining the insurance proceeds. He testified that the suggestion was made to and accepted by, in addition to himself, Jones and Lagattuta, and that the four of them, including Petrone, thereafter agreed to split the proceeds "four ways". He testified further that in preparation for burning the club down, he,

[4] Since the jury was charged that the Government must have proved that the defendants conspired to procure and procured the burning of the club, I take the contention as not that the charge of the court was in error, but only that the evidence was insufficient.

Jones and Lagattuta went around and punched holes in the walls of the club sometimes in April 1970 for the purpose of providing "air ventilation" for the fire. Lastly, Teny testified that after the club burned down, he received his share of the proceeds from Jones.

The fire occurred on May 5, 1970. Several witnesses, mostly local residents, testified as to events at the scene of the fire. There was testimony that two men were in the club in the early morning hours of May 5, shortly before the fire started; that a crashing noise which sounded like breaking glass was heard contemporaneous with the starting of the fire; and that from the time of the first flicker at the club until it was engulfed in flames a scant five to ten minutes elapsed. There was testimony, too, that a short, stock man with black, bushy hair was seen jumping into a big car that had a light colored bottom and a black top in the immediate vicinity of the club; that the car was running at the time the man jumped into it; and that after he was in, it sped away with its lights off. Finally, there was testimony that there was a heavy odor of gasoline in the air at the scene.

Although the man seen jumping into the car could not be positively identified, the inference was that it was Lagattuta who is short, stocky and has black, bushy hair. Whether or not that testimony alone is sufficient to link the defendants to the procuring of the fire is academic, since there were additional circumstances. The desk manager at a local motel testified that a "Mr. Late" was registered as a guest from May 2 to May 7, 1970; that "Mr. Late" was Lagattuta; that Lagattuta was driving a white Buick; that

it was not in the motel's parking lot between 3 A. M. and 4 A. M. on May 5, but that it was in the lot between those hours on May 2, 3, 4, 6 and 7; and that the morning of May 5, it did not take a long time to clean the room occupied by Lagattuta. In view of all the testimony, bearing in mind that the evidence must be viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U. S. 60 (1942), I conclude that the evidence was more than sufficient to provide a basis for the jury's verdict.

Secondly, the defendant Luick contends that as to him there is no proof that he knew the fire was set intentionally. Luick's role in the scheme was as an independent public fire adjuster. While there is direct evidence of his participation in the falsification of the invoices presented to the insurance company, there is, as he contends, no direct evidence that he knew that the club was "torched". There is, however, circumstantial evidence. Luick was a professional fire adjuster. He was participating in the falsification of invoices to substantiate a claim when, on March 23, 1970, a suspiciously short time before, the insurance coverage on the club had been increased from $55,000.00 to $160,000.00. Moreover, and most important, was the testimony regarding Luick's reference during a conversation with an insurance agent, to the cause of the fire as "Jewish lightning", the trade term for arson. I think, as obviously did the jury, that the evidence is sufficient to infer Luick's knowledge. *Cf. Blumenthal v. United States*, 332 U. S. 539 (1947).

Thirdly, the defendants argue that they were prejudiced by the Government's having Teny, who was the principal

prosecution witness, immunized in open court in the presence of the jury, after he invoked the Fifth Amendment.[5] They characterize the proceedings as "unnecessary dramatics" by which they were "extremely" prejudiced. Since the tone and manner of the proceedings were unspectacular, I am treating the defendant's argument as an objection to the mere occurrence of the proceedings.

To support their contention, the defendants cite *United States ex rel. Fournier v. Pinto*, 408 F. 2d 539 (3rd Cir. 1969). I think *Fournier* is clearly inapposite. There, the prosecution called a witness who invoked the Fifth Amendment. But thereafter he was not afforded immunity, and he did not testify. The error, it was held, was in the creating of "inferences arising from the use of the testimonial privilege". Here, no inference was created; indeed, the affording of immunity was for the purpose of compelling the witness' testimony, and the witness did in fact testify. No prejudice, then, extreme or otherwise, inured from the immunization proceeding to the detriment of the defendants.

Lastly, the defendants maintain that while as to the substantive counts the proof need be only that it could have been reasonably expected by them that the mails would be used, as to the conspiracy count, the proof must be that it was actually intended and contemplated that the mails would be used. Assuming, without holding, that to be the

[5] The defendants contend in addition that the immunity request was improperly executed. They clearly, however, have no standing to attack the propriety of the immunity request, and consequently their contention must be rejected, and the coincident motion to compel admissions from the Government denied.

law,[6] the conspiracy count was submitted to the jury on the charge that it was a part of the conspiracy that "the conspirators would place and cause to be placed in the post office and authorized depositories for mail", matter to be sent and handled by the post office. Aagin, then, the contention is not that the charge was improper, but that the evidence was insufficient to sustain the convictions.

The defendant's contention ignores the duration of the conspiracy. It was proved that it continued at least through October 1970. And on September 29, 1970, the defendants Jones and Petrone executed a "Sworn Statement In Proof Of Loss" which was the same day mailed or caused to be mailed[7] by Luick to the adjuster representing the insurance company. In *Pereira v. United States*, 347 U. S. 1 (1954) it was held that an agreement to use the mails need not date from the inception of the conspiracy, and that it is proper to allow a jury to determine from the circumstances whether or not an intent to use the mails was shared by the conspirators. I think the letter of September 29, although there is evidence of other mailings on other occasions, is sufficient to support the jury's finding that it was intended by the conspirators that the mails would be used.

An appropriate Order denying the defendant's motions will be entered.

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[6] See *Pereira v. United States*, 347 U. S. 1 (1954); but *cf. Blue v. United States*, 138 F. 2d 351 (6th Cir. 1943).

[7] It is stated in *Pereira v. United States, supra*, n. 5. that "[W]here one does an act with knowledge that the use of the mails will follow in the ordinary course of business . . . then he causes the mails to be used."

ORDER.

AND NOW, to wit, this 16th day of November, 1972, in consideration of the foregoing Opinion, IT IS ORDERED that the defendants' Motion For New Trial, Motion For Arrest Of Judgment and Motion For Judgment Of Acquittal all be and the same hereby are denied.

IT IS FURTHER ORDERED that the defendant's Motion To Compel Admissions be and the same hereby is denied.

IT IS FURTHER ORDERED that the defendants appear with counsel before this member of the Court in order that sentence may be imposed on Tuesday, November 28, 1972 at 2:00 P. M. in Court Room No. 12, 10th Floor, U. S. Post Office and Courthouse.

HUBERT I. TEITELBAUM,
United States District Judge.